SUU LIN CHONG v. LEE YAW SEONG

[A.C.J. (Wan Yahya J.) November 20, 1978]

[Melaka — Civil Appeal No. 2 of 1978]

Contract — Moneylending transaction — Contract unenforceable and void — Whether money lent could be recovered — Moneylenders Ordinance, 1951, s. 15 — Contracts Act, 1950, ss. 2(g) and 66.

Moneylending — Unenforceable contract — Whether money could be recovered — Moneylenders Ordinance, 1951, s. 15 — Contracts Act, 1950, ss. 2(g) & 66.

In this case the respondents sued the appellants for repayment of what he claimed to be a friendly loan. The learned President of the Sessions Court found however that the loan was in fact a money-lending transaction. He held however that as the appellant had admitted that a sum of $3,000 was in fact borrowed by him, judgment should be given for the respondent for this sum. The appellant appealed.

Held, allowing the appeal: in this case the true position was that the contract was an unenforceable and void one from the very beginning and each party was aware of this and therefore the learned President was wrong in ordering restitution of the sum lent.

Case referred to:-

(1) *Menaka* v. *Lum Kum Choon* [1977] 1 M.L.J. 91.

CIVIL APPEAL.

Tan Lip Yip for the appellant.

Foo Nyong Tiam for the respondent.

Cur. Adv. Vult.

Wan Yahya J.: This is an appeal against the order of the learned President Sessions Court, Melaka.

The respondents in this appeal had sued for the repayment of what he claimed to be a friendly loan. After hearing the evidence adduced by both parties the learned President concluded that the loan was in fact a moneylending transaction and that, as the defendant/appellant had admitted both in his affidavit and in evidence that a sum of $3,000 was in fact borrowed by him, he gave judgment for the respondent for this sum. Subsequently in his grounds of decision the learned President expressed the view that he should have taken into account the repayment of $400 made by the defendant/appellant and therefore the judgment should have been for $2,600.

The rationale for this judgment by the learned President as in his grounds of judgment was that, although the provisions of the Moneylenders Ordinance would render the contract between the parties unenforceable under section 15 of that Ordinance and correspondingly void under section 2(g) of the Contracts Act, 1950, the defendant/appellant had to restore the advantage which he had received from the plaintiff/respondent by virtue of section 66 of the latter Act. The learned President cited the Privy Council case of *Menaka* v. *Lum Kum Chum*[1] as his authority. Now section 66 of the Contracts Act, 1950 reads:—

"When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

The impression I get from reading this section is that the section is not intended to apply *ex abundante* to all void contracts. On the contrary, it is restricted in its application to agreements 'discovered' to be void or to contracts which 'become' void. The term 'discover' here clearly indicates something which the parties were not aware of at the time of making the agreement and which they gained sight of or detected only subsequently. Similarly the word 'becomes' refers to something not present when the contract was signed but came into being at a later stage. In this case there is no element of discovery or change involved. The defendant/appellant had all along averred not only that the transaction was a moneylending contract but also that the interests were excessive. The learned President had described the document signed by the defendant/appellant and produced before him as something "shrouded with mystery." The learned President accordingly applied section 114(g) of the Evidence Act against the plaintiff/respondent for failure to call witnesses and had found that the sum of $3,000 passed from one party to the other and, by inference, had found that the difference between the sum and the $5,000 shown on the document to be the interest from a moneylending transaction. The learned President having seen the parties and heard their evidence, had preferred the evidence of the defendant to that of the plaintiff. There was no cross appeal from the plaintiff to suggest that he disagreed with the particular findings by the learned President and neither were they seriously attacked in this court. I see no reason to interfere with such findings of fact. It follows therefore that the learned President had found that the parties were aware from the very beginning that the transaction was void and the letter, marked P1, was a mere device to conceal the real nature of the transaction and that it was an attempt to frustrate the operation of section 15 of the Moneylenders Ordinance. There is nothing on the evidence to support that anything not known to the parties had surfaced into sight or that anything had occurred subsequent to the contract to make it void. The true position is that the contract was an unenforceable and void one from the very beginning and each party was aware of this.

I do not think I need look very far for the authority on the subject. In the case cited by the learned President itself the Privy Council held that section 66 of our Contracts Act was similar to section 65 of the Indian Contracts Act and their Lordships held that the principle of *condictio causa data causa non secuta* applied to both the sections.

It has to be borne in mind that in that case before the Privy Council Mohamed Azmi J., the learned trial judge, had found from the evidence that the contract was 'discovered' to be void only after proceedings were commenced to enforce it. I am of the opinion that the learned President had misapplied the law relating to the principle of restitution under section 66 of the Contracts Act. It is for that party to a contract claiming such restitution to satisfy the court that he was unaware of the illegality until after execution.

I would accordingly allow this appeal, reverse the decision of the learned President and enter judgment in favour of the defendant/appellant. The plaintiff/respondent will pay the costs of the appeal in this court and in the court below.

Appeal allowed.

Solicitors: *Tan Lip Yip & Co.; Foo Nyong Tiam & Associates.*